

**MEMORANDUM OF UNDERSTANDING BETWEEN THE
U.S. DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION AND
THE STATE OF WASHINGTON DEPARTMENT OF ECOLOGY FOR WATER
EXCHANGE IN THE YAKIMA BASIN**

PARTIES

This Memorandum of Understanding (MOU) is entered into between the State of Washington (State), acting through the Department of Ecology (Ecology) and the U.S. Department of the Interior Bureau of Reclamation (Reclamation).

INTRODUCTION AND HISTORY

In 1945 the Federal District Court for the Eastern District of Washington approved a consent Judgment providing for Reclamation to facilitate diversion of water from the Mainstem Yakima and Naches Rivers to enumerated parties from storage, return flows, natural flows and other sources, denominated as the Total Water Supply Available (TWSA), according to parties' status as pro-ratable or non-proratable. All parties to the Consent Decree have water rights of May 10, 1905 or earlier priority.

In 1989, anticipating passage of federal legislation pertaining to water conservation in the Yakima basin, the Washington Legislature enacted Chapter 90.38 RCW, authorizing the Yakima Basin Trust Water Rights Program. The legislature recognized that the interests of the state would be served by developing programs, in cooperation with the United States and the various water users in the basin, that increase the overall ability to manage basin waters in order to better satisfy both present and future water needs.

In 1994, Congress authorized Phase II of Title XII, Yakima River Basin Water Enhancement Project of 1994, P.L. 103-434, (YRBWEP). Ecology and Reclamation have worked together for more than a decade to jointly identify and fund various conservation projects and water right acquisitions that advance the goals and objectives of Title XII. The adjudication of Yakima basin surface water rights initiated in 1977 is progressing towards conclusion. The Court has adjudicated thousands of claims to surface water rights in the Yakima basin and conditionally determined the extent and validity of those rights. Further, the relative priority of surface water rights have also been conditionally determined.

In 2001, the Roza Irrigation District (Roza) first sought curtailment in *Ecology v. Acquavella* of junior users to protect "proratable" water users, like Roza, who rely on May 10, 1905 rights that are based on Reclamation's initiation of the Yakima Irrigation Project. The court entered an order only for the year 2001 curtailing the use of water by certain water right holders with a priority date later than May 10, 1905 ("junior" rights).

Deleted: Water right acquisitions in several upper Yakima Valley tributaries have significantly improved stream flows for the benefit of anadromous fisheries. Conservation projects funded by Reclamation and Ecology through YRBWEP benefit target flows in the lower Yakima River by adding two-thirds of the conserved amount of water to flows.

¶ In 1999, Reclamation and Ecology, together with the Yakama Nation, agreed to participate in an extensive study of Yakima basin ground water resources and develop a model to better describe how surface water and ground water within the Yakima basin affect one another. The USGS is expected to release the study and model in 2007. Until the study is complete, an August 1999 MOU between the YN, USBR, and Ecology ensures that Ecology's water permitting actions are performed within a conservative framework that protects existing federal and state-based water rights.

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In 2004, a year of mild shortage, a call for curtailment of post May 10, 1905 rights was renewed with the court. An order in Ecology v. Acquavella curtailing certain junior rights was entered on June 10, 2004. This order did not provide an exception for in-house domestic water use. This order superseded the earlier 2001 order. On March 11, 2005, the adjudication court issued an amended order that remains in effect. The March 11, 2005 Order Limiting Post-1905 Diversions provides that when Reclamation imposes prorationing among May 10, 1905 rights, certain identified, post-May 10, 1905 water users are immediately curtailed. The curtailment of the junior rights remains in effect until prorationing among May 10, 1905 rights ends.

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Prorationing has occurred in the Yakima Basin during three irrigation seasons since 2000. Consequently, above the Chandler power return in the lower basin, "junior" water rights are not reliable. (fails to mention Treaty Rights and incompletely describes effect of order).

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The senior water right acquisitions and proposed transfers generally lead to changes in point of diversion, place of use, or season of use. Changes in point of diversion and purpose or season of use can impact project operations by changing the location where a call for water occurs along the Yakima River or its tributaries, where return flows find their way back to the natural river course, and in the case of domestic or municipal supplies, when the call for water may occur. In a severe case, the transfers could cause impairment to pro-ratable users by reducing the TWSA. If water is to be transferred downstream a significant distance, the transfer can favorably affect project operations for instream flow improvements. Water transferred upstream for use depletes the river reach between the two points of diversion and can reduce operational flexibility by leaving a gap in flows which can, if necessary, be mitigated through drafts of storage water.

Certain existing users, especially in the upper basin, find their water rights to be inadequate. Others seek water rights, through transfer, for new uses. In both cases, these users may be at continued risk of curtailment of their junior or transferred senior water rights, without the use of Reclamation storage facilities.

Reclamation and Ecology desire to implement a water exchange program to provide a potential solution for the water needs without impacting the TWSA-based rights.

The City of Roslyn filed a motion on November 10, 2004 seeking an exemption from the above orders for its indoor domestic use. On August 24, 2005, the Court Commissioner in Acquavella issued its Memorandum Opinion Re: City of Roslyn's Motion to Revise Order Limiting Post-1905 Diversions During Periods of Water Shortage.

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PURPOSE, OBJECTIVE AND SCOPE

Ecology and Reclamation intend to use their best efforts to work collaboratively and in good faith to pursue and implement a program to address the issues raised in the above orders and Memorandum Opinion with the goal of seeking to find water for certain junior water right holders with post-1905 priorities, without impairing the water rights or other

rights of other parties. Ecology and Reclamation are seeking to use water banking and exchange and the delivery of water under subsequent mitigated permits between Ecology and identified third-party water users.¹ This MOU outlines the relationship between Reclamation and Ecology for the water exchange process. This voluntary intergovernmental MOU is not a contract.

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This MOU applies to the Yakima River and its tributaries upstream from Wanawish Dam outside of the Yakama Reservation.

This document is a policy statement only for internal use by the Department of Ecology and the Bureau of Reclamation. It does not affect rights or procedures available to members of the public. Nothing herein affects Ecology's duties under existing law to review each application for the transfer of a right either into the state trust program or out of the trust program so as to insure that the transfer does not impair the rights of any party nor impair fish life anywhere in the Yakima Basin. Nothing herein affects Reclamation's duties under applicable law.

PROCESS

1. Ecology identifies the type and location of participants (junior water users) and quantifies their water demand;
2. If the senior right is acquired from an individual or entity, Ecology negotiates the conditions of the trust water right prior to placement of the water right into the Trust Water Program (TWP);
3. Ecology acquires senior water rights;
4. Ecology issues appropriate instruments associated with the trust water right.

Ecology and Reclamation may then execute a contract to implement the following general procedures:

5. Ecology conveys the trust water right to the United States as part of a bargained-for exchange for the use of storage. Ecology certifies all changes to the water rights as permanent.
6. Reclamation will provide a water service/water delivery contract to Ecology for quantities of stored water commensurate with the value of trust water rights conveyed to the United States.
7. Concurrently, Ecology issues a permit to the designated water user as a state action.
8. Reclamation makes water available pursuant to the water service/water supply permit. (See below.)

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¹ Section 1203(i)(2) of Title XII (YRBWEP), states: "The Secretary shall, to the maximum extent possible under applicable Federal, State, and tribal law, cooperate with the State of Washington to facilitate water and water right transfers, water banking, dry year options, the sale and leasing of water, and other innovative allocation tools used to maximize the utility of existing Yakima River basin water supplies."

In addition to many sections of RCW 90.38 and 90.42 RCW 90.42.100 states: "(1) The Department is hereby authorized to use the trust water rights program in the Yakima river basin for water banking purposes."

Ecology will not convey water to Reclamation nor will Reclamation accept any water rights or issue a water service/water delivery contract if any senior water right holder in *Acquavella* has its water or other rights impaired or diminished, directly or indirectly. Prohibited "impairment" shall include, but not be limited to, any action that has the effect of increasing the consumptive use of any water right or impairing or reducing the Total Water Supply Available (TWSA) and/or undertaking or approving any other action that will have a localized impact on streams or river reaches, which in the opinion of the System Operations Advisory Committee (SOAC) impairs fish or other aquatic life including by reducing available fish habitat even if such action does not otherwise increase consumptive use of water or reduce TWSA.

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PRIORITIES

In general, the purpose of this water exchange program is to provide a means to resolve some Yakima Project operational issues that result from the need for water for existing or new uses. This program may assist junior domestic and municipal users who require full-year use of safe and reliable water without reducing Reclamation's ability to manage and deliver project water. Because of the relatively small amounts of water required, and pending *Acquavella* special considerations, the initial efforts of this program will focus first on these junior domestic and municipal users.

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WATER EXCHANGE MANAGEMENT

1. Ownership: Pursuant to the intended contract, the water right will be vested in the United States on behalf of the Washington State Department of Ecology.

2. Delivery: The trust water conveyed to Reclamation will maintain its elements, including priority date. Reclamation will provide a water service/water delivery contract to Ecology to make water available to identified exchange program water users while ensuring flexibility, discretion, and protection of all river operations and non-program water users and water right holders.

The maximum amount of water to be delivered will be limited to the consumptive amount of water associated with the trust water right exchanged for a contract, less any amount required by condition VI.3 to demonstrate substantial environmental benefit/fisheries benefit.

Further, that amount will be limited to:

- The amount of water available at the original point of diversion of the trust water right exchanged for a contract;

and,

- The amount of otherwise unused storage capacity in project reservoirs that is available to store water under the trust water right exchanged for a contract. The amount would be calculated on a month-to-month basis during the irrigation season and would identify a volume of stored water at the end of the irrigation season available for use until the beginning of the subsequent irrigation season. In

determining the amount of unused storage capacity, Reclamation will not use any water if SOAC or other party recommends it be kept in storage for use as carryover or for use for fish and other aquatic life during the winter and next irrigation season ;

3. Substantial Environmental Benefit/ Fisheries benefit: Ecology will ensure that a transfer will not be prioritized under the Hillis Rule unless there is an instream benefit to the Yakima River basin consistent with the purposes of YRBWEP and the Yakama Nation's Treaty water right for fish and other rights. This objective applies to all water rights placed into the trust water program for the purpose described in this MOU.

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The instream benefits may be demonstrated in one of two ways:

- a. Ecology acquires the water right(s) from a priority tributary stream identified by the State's water acquisition program or YRBWEP with the net result that instream flow is improved in that stream; or,
- b. Ecology reserves from the conveyance to the United States a one-third share of that acquired water, to be delivered instream to benefit the Yakima River below Parker if the other provisions in this agreement are not otherwise violated.

4. Costs: Reclamation will require Ecology to advance funds for its proportionate share of project O & M costs annually. Ecology may allocate proportionate shares of project costs in the price of program water to be charged to the users.

5. Non-Impairment:

- a. Ecology will include in each mitigated permit a provision where the user agrees that valid priority calls against source trust water based on local limitations in availability may result in temporary curtailment of the use of water under the contract until the priority call for water ends.
- b. Ecology and Reclamation agree that implementation of this MOU or execution of any subsequent mitigated permits pursuant to this MOU shall not cause detriment or injury to the rights of existing water users or otherwise be inconsistent with this MOU.

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6. Non-use and Reallocation: Where the water user does not beneficially use the water identified and deliverable under this program for its permitted use, Ecology may reallocate that water to another user.

7. Source availability matching:

- a. Ecology will maintain an inventory and account of exchange program water rights and their associated permits. Reclamation and Ecology will jointly monitor the performance of this program.
- b. Ecology will use generally accepted techniques for calculating the consumptive use and normal return flow characteristics associated with each acquired trust water right. Depending on the circumstances, the consumptive use amount can be a single value expressed as acre-feet per year, or could vary seasonally and be expressed in acre-feet per month, or for short duration could be a single year or single month values based on climate for that period.

8. NEPA/SEPA Compliance: Reclamation and Ecology agree that contracts entered into pursuant to this MOU will be both Federal and State actions. Further, Reclamation and Ecology agree that mitigated permits between Ecology and water users will be State actions. Each agency will be responsible for their respective environmental compliance requirements.

GENERAL PROVISIONS

1. Nothing in this agreement expands, alters or limits the property or other rights, authority, responsibilities, sovereignty, or jurisdiction of any party. Nothing herein shall act to waive, abrogate, define or diminish the Treaty rights of the Yakama Nation nor the sovereign rights of the State of Washington, the Yakama Nation or the United States.

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2. Notwithstanding any other provision of this MOU, the parties acknowledge that Reclamation's actions are subject to federal reclamation law, as amended and supplemented, and the policies, rules and regulations promulgated by the Secretary of the Interior under federal reclamation law; and applicable federal law, including but not limited to, the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). NEPA compliance activities may include public scoping meetings and hearings, Fish and Wildlife Coordination Act consultations, and cultural resource consultations with Tribes on Indian Trust Assets. ESA activities may include consultation with NOAA Fisheries and the USFWS.

3. Notwithstanding any other provision of this MOU, the parties acknowledge that any contract executed under this MOU where Project benefits are afforded shall be subject to federal reclamation law, policies, and rules and regulations governing recovery of Project costs. The parties further acknowledge that the costs of development, review and approval of proposed actions, including but not limited to, environmental compliance activities preparation, negotiation and execution of contracts, and any other costs of mitigation determined to be required, shall be incurred by the benefiting contractor. Costs to the benefiting contractor may be mitigated by other enhancement or contributions that benefit the parties to this MOU, at the discretion of Reclamation. Any contract executed under this MOU that implements a joint federal and state program, as authorized and directed by federal law and funded through federal appropriations, shall be subject to federal cost sharing laws, policies and practices.

4. Nothing in this MOU is intended to create any right in any entity not a party to this MOU nor shall any entity be considered a third party beneficiary to this MOU. This MOU is not intended to bind or affect any non-signatory party, and the failure of any non-signatory party to object to any provision of this MOU cannot be viewed as waiving, affecting, or prejudicing any non-signatory party's rights, factual arguments, legal arguments or legal positions.

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5. This MOU constitutes the entire MOU between and among the parties with respect to the subject matter of this MOU. Any modification of this MOU must be made in writing and agreed to by all the parties.

6. All actions called for by this MOU are subject to and contingent upon the availability and allocation of future federal and state appropriations, existing and future limitations on a party's statutory authorities, and state and federal regulatory approvals as needed. The parties recognize that if any necessary authority and/or funding is not forthcoming, the schedules identified in this MOU will be reviewed and adjusted as necessary, by mutual consent.

INDEFINITE TERM

Ecology and Reclamation enter into and continue this MOU voluntarily and in good faith. This MOU shall be effective upon the signatures of the officials listed below. This agreement may be amended or supplemented at any time by mutual consent of the parties. This MOU is severable from any contracts that are entered into pursuant to this MOU.

TERMINATION OF MEMORANDUM

This MOU may terminate upon the following conditions or events:

- a. Where this agreement creates a financial detriment to the United States.
- b. Upon written notice by either Reclamation or Ecology.

SIGNATURES

J. William McDonald, Regional Director
Pacific Northwest Region, Bureau of Reclamation

DATE

Jay Manning, Director,
State of Washington Department of Ecology

DATE

ROZA IRRIGATION DISTRICT
COMMENTS ON BOR-DOE MOU

Roza Irrigation District is generally amenable to a process to supplement municipal and domestic water rights through the acquisition of senior water rights as long as existing rights and TWSA are not adversely impacted.

Water users above the existing storage reservoirs will receive a substantial benefit if they are permitted to use the Bureau facilities to store water for year around use. That advantage is magnified because they are required only to pay a proportionate share of the costs for operation and maintenance rather than the cost for construction.

On a large scale, the program will impact TWSA and the water rights of existing BOR contract holders. Therefore, the program should be limited to municipal and indoor domestic uses and should not be expanded to include irrigation.

The program incorporated in the MOU can alleviate some of the existing conflicts between the municipal or domestic users with post-1905 water rights.

However, Roza is interested in the details of the implementation and all water transfers to implement this program must meet existing criteria. Roza reserves the right to comment upon and to oppose specific transfers which may impact TWSA generally or which might impact Roza's water supply.

Roza will review the contracts between BOR and the water users. It must be clear that if the withdrawal of water from the reservoirs adversely impacts TWSA or the water supply for Roza, then the water may not be withdrawn.

Will the consumptive portion of the senior water rights acquired by DOE will be available for diversion to the same extent a water supply contract is provided by BOR?

Roza understands the intent is that DOE may protect the portion (1/3) of the water dedicated to instream flow and that portion of the water will not be part of the water supply contract provided by BOR. The remaining portion (2/3) of the water will be available for diversion by parties entitled to receive deliveries from the TWSA.

What impact of the water deliveries made to municipalities and domestic water users during the winter have upon the carry over supply and the reservoirs in the event the reservoirs fail to fill completely the following spring?

Will DOE and BOR continue to use the October through September water year to account for the water deliveries under the contracts?

Barwin, Robert F. (ECY)

From: Adam W. Gravley [agravley@BUCKGORDON.COM]
Sent: Sunday, August 27, 2006 11:00 AM
To: wferry@pn.usbr.gov; Barwin, Robert F. (ECY)
Cc: Reichman, Alan (ATG); Charles Shockey; HOCKPOTATO@aol.com; Mayor Jeri Francisco-Porter
Subject: BOR - Ecology Draft MOU

Bill and Bob:

Thank you for your continuing work on the MOU and other efforts to resolve upper Yakima River basin water issues. I am submitting this comment on the draft MOU on behalf of the City of Roslyn.

The draft MOU is a positive first step, and the City continues to be optimistic that this concept can ultimately grow into a resolution. However, the draft MOU has some fundamental flaws that we encourage you to address in the next draft. These are outlined below, together with some specific comments from Roslyn's perspective. I recognize that the draft MOU is an initial draft, and that numerous questions were raised in the WTWG about specific provisions or phrases. Accordingly, I am holding any comments on the particulars until the next draft. This comment focuses on the major issues that concern the structure and policy of the document.

First, the agencies should use the "assignment model" in the MOU. As I understand it, the assignment model contemplates an Ecology-BOR agreement to manage a group or groups of state water rights placed into the state trust water rights program. Ecology would assign these rights to BOR for a term of years, and BOR would provide a storage commitment for a corresponding term and quantity of water. Ecology would then have relationships with each of the water rights or the owners of the water rights in the trust program, such as Roslyn. Under this concept, Roslyn as other water users would not have a direct contractual or transactional relationship with the BOR.

The strength of the assignment model is flexibility and practicality. It can accommodate temporary transfers, leases, mitigation agreements, as well as permanent transfers. It can respect private property rights and accept a variety of contractual mechanisms and tools. The assignment model has far lower transaction costs for all parties -- the US, the State, and private parties and water users. It also ensures that the BOR is made whole by matching the group of state rights in trust with the storage benefit that BOR is providing. The "source availability matching" in the draft would work well here to ensure "value" to the BOR in consideration for the storage water. In short, the assignment model is well-suited to address the issues at hand.

For example, as you know, Roslyn acquired a water right on Currier Creek to mitigate for out-of-priority use of the City's water right during drought years. In non-drought years, however, the City intends to offer the Currier Creek water right for lease (for either instream or out-of-stream use) in order to recover some of the costs it has incurred recently in Acquavella. The MOU should accommodate this legitimate objective, as it is not unique to Roslyn. The assignment model has sufficient flexibility to work here.

In comparison, the exchange model as reflected in the draft has significant shortcomings. First, only permanent transfers are allowed. This would eliminate whole categories of transactional options that could be used to solve problems in the basin. This structure will likely frustrate the purpose of securing water rights to mitigate for junior domestic water rights, for example.

Second, the MOU calls for water right ownership to be conveyed to the US. This proposal has numerous issues. It is not fair for ownership to be exchanged for a term contract. In Roslyn's case, this would result in the US having the benefit of the Currier Creek water right in all years, whereas Roslyn would only benefit from storage in proration years. Requiring US ownership would preclude Roslyn's plan to use the Currier Creek water right as described above to recover significant expenses incurred in responding to recent adjudication events. Moreover, requiring title conveyance to the US will increase the time and costs for all involved. Please acknowledge the costs of compliance with federal contracting requirements to small entities! In short US ownership is unnecessary for the solution and it would create many problems.

Third, the draft contemplates that Ecology will issue a permit to parties receiving or benefiting from a portion of the US storage commitment. Is a new permit process necessary? It seems to me that Ecology could simply confirm storage benefits or status by letter in the existing state water right file.

Finally, the basis for reserving a one-third share of water acquired to the US is unclear. At first read, this looks like a large "excise tax" on the water user. If you propose to retain this feature of the MOU, you need to explain the purpose and justification for the water exaction. Instream benefits and interests need to be considered and reflected in MOU, but the exaction proposal appears to overreach in a way that could frustrate potential solutions.

Thank you for the opportunity to comment and I look forward to working with you on the MOU in September and beyond.

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9/14/2006